

## THE TRADITIONAL DIALOGUE BETWEEN LAW & ECONOMICS

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The purpose of this paper is to discuss the possible compatibility of legal and economic reasoning. I assume that law and economics are two different subjects and have been so treated in the civil law tradition for quite some time now. Economics has developed in the last two centuries as a field, although it originally grew out of ethics, or political science (*politica* and *policia*) and in this respect it gained autonomy from a larger field of knowledge: practical philosophy. Law also developed from the same field, but it has a much longer career, that could be traced back at least to the XII century, in Bologna in the case of Western law. Contrary to what happened with economics, law never developed any mathematical or abstract model, in spite of the efforts made by Leibniz.

The discussion I am suggesting has its context in a constitutional framework and an economic circumstance: it takes place in a legal system whose highest or primary rule is a written constitution of a welfare democratic state (*estado social de direito*), and it is contemporary with the rising of a global economy. Another important part of its circumstance is a given and strong legal tradition. Legal thought in Brazil has a fairly established tradition of almost 180 years. Law does not grow on trees; it grows on collective imagination and collective imagination is not to be taken lightly. This discussion, therefore, takes place in a historical and existing legal system, in which people (ordinary citizens and legal practitioners) already act, exist, believe in things and behave accordingly. Rules do exist and have been used for a long while now. The background legal culture of this paper is one where the liberal tradition of strong protection of private interests is dominant, as

has been revealed by the research of Castro on the Supremo Tribunal Federal (Castro 1977).

A general background assumption of this paper is the belief that even if economics has not been usually acknowledged as an important part of legal practice, its practical character as well as the general applicability of its mode of reasoning in certain practical matters have provided rules that jurists usually apply. Therefore, state regulation of the market comes not as a total novelty in terms of legal reasoning. In fact we can show a long series of examples of economic rationality living within the legal field. These examples however frequent and daily as they may be, are not the ones that shape the minds of legal practitioners. This paper will try to show how economic reasoning may enter into the law. But in so doing it will also acknowledge or suppose that legal reasoning keeps its autonomy and in certain issues economic rules will not be allowed to override legal considerations. Finally, then, the paper assumes that the economics may not play the role of the supreme practical philosophy.

I assume that such a task is relevant in Brazil as legal scholarship, legal practice and court decisions have tended to equate economic regulation with undue interference of the state in private freedom or with unacceptable use of economics to decide legal matters. Tension has risen among courts of different levels with some accusations that higher courts make political judgments, whereas lower courts make technical (legal) decisions. This sort of political confrontation is sometimes fueled by legal scholarship that underestimates the analysis of what legal reasoning really does and allows to be done.

The paper is divided into three parts: a first part deals with the differences between legal and economic reasoning, by assuming that both disciplines diverge in terms of the meaning of actions each of them assumes as a given. The second part will proceed historically, providing a short series of examples of the existence of economic concepts in legal practice and affirming the need to restore the analytical distinction between commutative and distributive justice. A short concluding section will analyze a possible research agenda for the doctrine on regulatory agencies and their possible conflicts with the judiciary branch.

## 1 IDEAL TYPES AND REASONING

### 1.1 RESULT-ORIENTED AND RULE-ORIENTED ACTION

Meaning and purpose are important concepts in dealing with human action. When we mention purpose, we assume that a given behavior is not simply the result of blind reaction. It involves some sort of choice, intention, etc. When we mention meaning we assume that the person will be able to give reasons. Meaning and purpose help us answer the question “why?” We can either answer “because...” or “in

order to..." The question "why" in this sense requires that its answer be given in terms of understanding. "Understanding is equivalent to: the interpretive apprehension of the meaning or connection of meaning". (Weber 1977, 9)

The answer to the question "why" could be given at different levels: (1) first it could give us a hint, or an apprehension, of the actual meaning of a given action (from a historical point of view: the actual intention and the actual understanding of a given and individual subject in a given circumstance along with her fellow subjects, etc). (2) Second, it could be answered by a general consideration, so it would be like a summary or an average account of what "people" usually do (an empirical generalization). (3) Third, the answer may be given from an ideal point of view, so that it takes the subject (the individual) not as an actually existing being, not even as a general (empirical average) being, but as *typos*. Of course, I am just reporting Max Weber's famous assertion about the differences between an "ideal type" and an "empirical generalization." This is a helpful way to start, as I am convinced that in this respect Max Weber was right. Law and economics, as two different disciplines, deal with two different meanings and purposes of human action.

Weber says that in contemporary times, it was economics that best developed this conceptual tool (the *ideal type*). Economics assumes just one isolated aspect of human rationality and action, and it develops its theory and the laws of pure economics out of this assumption (this type). It converts any human action in its own terms, it constructs one instrument of commensurability of actions (money – the *universal measure of goods*), and it proceeds to analyze "this special form of human behavior, if it were taken thoroughly seriously and devoted to one purpose, without any disturbance either from mistakes (errors) or affections, aimed at one exclusive end (the economic end). But the actual action only in a few cases (the stock exchange), and even then only in an approximate way, happens in the same way as it was conceived in its ideal type." (Weber 1977, 9) Economics has gained enormous prestige within the academy even though its capacity to give a secure account of what will happen in the future remains fairly limited. It may work better in certain fields, but even then, all it can say is that things will happen this way, *caeteris paribus*. If people invent new modes of credit, if new ventures are created, if a new technical discovery is made, if the organization or division of labor change, if... then, it is rather possible that things will diverge slightly or greatly from what the ideal type suggested.

If the ideal type of economics is a certain form of rationality, and if this rationality gives meaning to actions "from an economic point of view", it is a good start to assume that human action and legal rationality can be accounted for "from a legal point of view". My idea is that law too has developed an ideal type and has been rather successful in using it. Its present lack of prestige is due to a variety of factors,

but I will not go into this here. I will rather try to recover what the specificity of law is, to further discuss how law and economics merge (if they do) in the legal apparatus of economic regulation. If you would excuse my going back some two thousand years ago, we will find this point of view explicit in Roman law, and then re-elaborated throughout medieval law: “the force of laws is either to command (*oblige*), to prohibit, to allow (*permit*), or to punish” (D. 1.3.7 – *legis virtus haec est imperare, vetare, permittere, punire*). So the legal point of view is essentially in its quintessence, the point of view of “following a rule”. Law’s ideal type of rationality is not obtaining some “good”, unless “good” is defined in such a general way that economics loses its classical specificity and becomes a general concept. But then we should go back to the tautological definition of good that leads us back to ethics or practical philosophy as it was understood until the XVIII century, in which case we would have come full cycle for economics: leaving ethics (since the physiocrats and Smith) and returning to it (with Becker, as put by **Pacheco** 1994, 77).

In designing an ideal type of law the two greatest legal scholars of the XX Century took two different views. For Hans **Kelsen**, the ideal point of view of following a rule should be constructed from the perspective of the subject who wants to avoid punishment. For Herbert Hart it was the subject who wanted to do the “right thing”. Whereas for Kelsen the ideal type of the legally rational man would ask “how can avoid punishment?”, for Hart the ideal type would ask “what do I have to do to be a law abiding subject?” But both had in mind the same rationality: even if for different “reasons”, the ideal type is the reason of one who is trying to “follow a rule”.

Ethics is another field of knowledge in which following a rule is the most prominent feature. This is why jurists in the course of Western history have always inquired into the differences and similarities of legal and ethical rules. One tradition within ethics, whose lineage is traced back to Aristotle, says that ethical rules are those that make men fully happy. Another one, expressed in German idealism, states that ethical rules are those whose obligatory force derives exclusively from the a priori or transcendental “sense of duty” determined by the principle of universalization. In either case – law and ethics -the idea of following a rule is an essential one: rules provide both a guide for action (from the point of view of who has to act and make choices) and an evaluation tool (from the point of view of the very subject or his fellow human beings) to criticize one’s choice. And this holds true for both law and morality. That is the point made by Aquinas when saying that law (*lex*) could be a measure in two different senses: first it was a measure for what should be done, as an architect has a measure to design his project; secondly it was a measure of what had been done, as when the architect finishes his work, and then verifies its results. It was, he said, a measure for action and for the product of one’s action.

However, if we intend to make a comparison between economics and law, the rationality in both cases is different in the sense that decisions will be assessed

(measured or criticized) in the realm of economics by “efficiency”, whereas decisions or actions in the realm of law will be assessed by the criterion of “legality”. That is, efficiency, in itself, will not be a full criterion of legality. It may be a lot more efficient to kill a part of the population, but laws tend to prohibit mass extermination of the poor, the sick, the undesired, and the ethnically diverse. Criteria of efficiency and cost benefit cannot be called as reasons to act in all circumstances. Sometimes legal reasoning is a limit to economic reasoning: no matter what the cost is, certain things are not done.

Authority in law provides an important criterion that differs from efficiency. You cannot explain (give reasons) in legal terms except by referring to some authority: impersonal and bureaucratic, traditional, ideal and transcendental. In the long history of Western legal tradition, different authorities were accepted as foundations of a legal system. The civil law tradition has developed sophisticated doctrines to determine what the *sources* of law are. Sources of law change. Different sources of law are actually different authorities. Why do you do this? Because the law tells me to do it. That is a perfectly sound answer, in legal terms, even if the specification of “what the law actually tells” is another incredibly large field of practical and academic discussion. What is the law here and now? Well, constitutional customs (the decisions of the Supreme Court, for an American citizen); a written text (and its doctrinal meaning) for a civil lawyer; the tradition of our people, for another group, and so on. But in the end, everyone will give an answer referring to some authority, even a simply moral authority (as it has been the case in international human rights law until recently, or – as I understand it – in Dworkin’s account of jurisprudence).

Kelsen’s ideal type is looking for an authority, and the authority she will find is, at the very end, the one allowed to impose a punishment. I will not go into the details of the philosophical nature of the “authority” in Kelsen. Suffice it to say that it is not a ‘de facto’ power (*potentia*), as some usually assume: it has to be a legal power (*potestas*).<sup>1</sup> Kelsen insists that his concept of validity is not empirical. In the case of Hart, authority too is objectified in the “rule of recognition”, whose logical function is exactly that of providing an authority, a “source” or a “principle” for any legal argument. In Hart’s case too, he refuses the accusation that he is a “plain fact” positivist, because the rule of recognition is not equal to empirical power.

It is fairly easy to take “authority” for an empirical authority (a person, an institution). It is also easy to take a rule as an order, in which cases the idea of rule is associated with a command given by someone. But there is more to it – following a rule may be more than just obeying someone’s orders. There may be some logic to the idea of following rules. This logic in legal reasoning authority suffers from a general “constraint of formal justice” (MacCormick) or a general constraint from the “principle of unity and equality” (Canaris), or “adherence to principle” (Rawls), or

“static justice” (Agnes **Heller**). This means that the very idea of a rule implies limits. **Wittgenstein** has a clarifying insight in his *Philosophical Investigations*. In discussing the idea of following a rule, he says that only someone who has grasped the idea of equality is capable of grasping the idea of a rule (and vice-versa). This is why examples always have to refer to types, not to things that happen only once: they express rules. Maybe this is also the idea found in the long tradition of Roman law: “laws are not made for things that happen only once” (D.1.3.3 and D. 1.3.4 – *ex his quae forte uno aliquo casu accidere possunt iura non constituntur*).

The very idea of law and rule imply the idea of equality. And the idea of equality implies that in like situations and in like cases, the same criteria should be used: the individual should act according to the same standard in every similar situation and different standards will only apply when differences are shown to be substantial. Now this is, of course, the concept of justice: “treat equal cases equally, and treat different cases differently”. Justice is equality, and inequality implies both injustice and non-consistency. There is a sort of logical flaw when differences are not respected and there is a logical flaw when equality is not respected. In a way it is a sort of absurd (as Hobbes puts it, getting the idea from the late scholastics, especially Luis de Molina, probably): in formal logic, reasoning is impossible if the principle of identity and non-contradiction is not applied. The same thing is true when legal reasoning does not “follow a rule”.

Canaris is very clear about it:

“The internal order and unity of law are far more than just scientific presuppositions of legal methodology; they belong above all to the most fundamental ethic-legal exigencies and are finally based on the very idea of law. Thus, the so-called requisite of order is a direct result from the well-known postulate of justice, to treat equal cases alike and to treat different cases differently, according to their differences. Both the legislator and the judge are bound to take the values seriously and think them thoroughly, up to the end, with all their individual consequences and avoiding their application only with justifying reasons, i. e., for substantial reasons: in other words, they are bound to act adequately. Rational adequacy is, as it has been said, the typical ‘order’ in the sense of a system, and therefore the rule of value adequacy, drawn from the principle of equality, is the first decisive sign for the use of systematic thinking in legal science, which is correctly explained by Flume, following Savigny, when he says that it is the legal consequence interiorly presupposed.”  
(Canaris 1996,18)

In this respect, the very idea of law implies the idea of justice from the logical point of view. I am not dealing here with the application of the principles of justice in actual situations, but rather with the logical idea of justice, which is that of equality.

It is doubtful if this idea of equality, rule and justice plays the same central role in any other academic discipline within the realm of the “social sciences”. When it does, it implies that the scholars of the field are supposed to use certain standards – that is, that they are bound to be consistent in producing their findings. But they are not interested in the establishment of the internal adequacies in the phenomena they study. This is due to the fact that they do not approach their subjects with a basic “practical” purpose.

A sound economic reason, even when based on belief in someone’s academic expertise or financial power, does not necessarily really on authority and rules in the same way as law. Economic reasons will finally say: “because this is more “economically sound” (efficient, cost-effective, etc). Of course I am oversimplifying the issue and totally ignoring the discussion within the economic field itself. My purpose here is just to insist that law and economics have operated on different grounds as far as conceptual frameworks go.

If the assumed rationality of economics is taken to be an empirical generalization or an ideal type, cases of non-conformity with it may generate the idea of a deviant rationality, in which case, someone who is “in charge” should try to correct the deviant rationality. Public authorities, business managers may then try to educate, correct and direct behavior which is not “rational”, that is, which does not seem to be able to insulate certain spheres of action from the other spheres of action. When, for instance, some one takes bounds of affection or blood relations into account instead of taking exclusively “economic” factors, this sort of behavior is deviant, from the modern point of view. But then, assertions such as these are definitely assertions of an ethical nature.<sup>2</sup> In fact, the practical side of economics may imply that “irrational” behavior can also be corrected.

Economic reasoning, as practical reasoning, is (a) forward-looking and (b) takes cost efficiency as a standard of rationality. The fact that it is forward-looking means that it is not interested in “passing judgment” on what has been done, not in the sense that whoever has done it “must” be “punished”, or must “pay back” what has been done. Economic reasoning takes the past into consideration in order to “learn” from it. It does not work in terms of “imputation” (Pufendorf). This is a fairly important trace of human agency so it but the tradition of legal reasoning in the last three hundreds years has not concentrated on this particular aspect, which had been a part of legal scholarship in other times.

Economics takes the agent’s response to her environment to be rational when it satisfactorily considers costs and benefits and finally chooses the one that results in greater benefits and lower costs, as the empirical limits of the situation will allow. This is the same type considered by John Rawls “the concept of rationality must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends.” (Rawls 1992, 14) Of course, what

are the costs and what are the benefits expected remains a matter of controversy, but the reasoning, the model or the form of the deduction remains valid.

This is naturally very different from a rationality that is backward looking, like that involved in retributive justice, and also different from one that has to reason from “counter-factual” premises. That is one typical case of law. Law is an instrument of deciding on what is “right” or “wrong” from a counterfactual point of view. Regularity does not play any part in normativity. Norms are necessary exactly when regularities will not lead to “satisfactory” results: norms are needed exactly when revenge (*vendetta*) will make life impossible in civil society. And law is typically used with a backward look: this is typically the case of adjudication.

If we consider the classical philosophical tradition it is clear that forward looking, in order to decide what to do, and looking backwards to decide on the “goodness” of what has been done are at the center of Aristotle’s analysis of the uses and functions of rhetoric as a form of reasoning. Rhetorical techniques are standards of correction of the use of one’s reason in dealing with what is contingent, not necessary. What is “contingent” (that is, merely *possible*) either will happen in the future, or has happened in the past. In both cases, he says, problems of “evidence” are at the very core of the techniques of rhetoric. In order to pass judgment on what happened we need to know the facts. In order to decide what to do in the future we must at least “guess” what will happen, and consider the course of possible events with or without our interference in them. Even if rhetoric is applicable in both cases, it is necessary to distinguish them as two different forms of practical reasoning. Prudence, the rational custom of making decisions in a proper way, is the sort of virtue to be developed in both cases.

Another important theoretical clarification of the relation between legal and economic rationality, besides is the general character of the first and the limited character of the second. This has been disputed by “law and economics”, as some authors try to include all normative reasoning in the realm of instrumental reasoning. Another school of thought that assumed that economics represented the most general field of knowledge in the human sciences is Marxism: Marx explicitly makes the point that what he calls “economy” is the whole realm of human activity, of which the exchange of goods is only a small part, even if it has a determinant influence on all others, as it is the one closest to the material reproduction of life. This was one important point in which he differed and diverged from the “classical” Ricardo. In spite of the long and deep discussion that such an assertion can inspire, I will assume there is this difference between law and economics exactly because in economic reasoning the result of one’s action that is submitted to scrutiny or deliberation plays an important role and, as classical philosophy would say, the result of the action can be separated from the agent.

Morality, on the other hand, is usually one step away from instrumental reasoning. It is a matter of course that in deciding what to do, in deciding what is the right



thing to do from the moral point of view, results will play an important part. In a classical example in his discussion of how the statutes (positive law) should be applied, Aquinas says that the ultimate sense of every case has to be found in what is just, and what is just is a certain “state of affairs”. Thus, if there is a certain time of the evening when the city gates are to be closed, in order to guarantee the safety of the city dwellers, or in his wording, with a view on the “common good”, a resident who is trying to escape from a band of robbers has a right to have the city gates open for him even after hours. In his interpretation, the sense (purpose, end result) of the law that sets a time limit for the opening of the gate is to save lives, and it should not be interpreted in such a way as to needlessly let one city member die (cf. *Summa Theologiae* II, II ae, q. 57). He even cites Modestinus’ phrase in the *Digest*: no reason should be strong enough as to interpret the laws in such a way that what was made to give men a good life should result in their own loss (*Nulla iuris ratio aut aequitatis benigna patitur ut quae salubriter pro utilitate hominum introductor, ea nos duriore interpretatione contra ipsorum commodum producimus ad severitatem*, D. 1, 3, 25). We can find a similar statement in John Rawls, when he is trying to clarify his differences with utilitarian reasoning. Rawls says that any ethical theory that does not take into consideration the results of actions is senseless.

Can legal rules be used to justify decisions over what to do in the future? Are cost-benefit arguments legal arguments? To answer this question I will try to give several examples drawn from the civil law tradition. We have reached a core issue in our course of reasoning. What sort of evidence, what sort of fact can be used to justify decisions?

## 2 ECONOMIC RATIONALITY IN LEGAL PRACTICE

In his important speech of presentation of the civil code draft, in 1804, Portalis made an interesting remark on the relations between law and other disciplines.

“There are things about which justice is clear and manifest. A partner, for instance, is willing to share all the profits of the partnership without sharing the risks; the claim is outrageous; it is not necessary to inquire beyond the agreement itself for an iniquity created by the very letter of the agreement. But there are things in which the question of justice is complicated with other issues, alien to jurisprudence. Thus, it is in our acquired knowledge on agriculture that we should look for justice and injustice, usefulness or danger of certain clauses contained in given land lease agreements. It is our knowledge of trade that put an end to the endless disputes on the interests on loans, on monopolies, on the legitimacy of certain conditions within maritime contracts and so many other similar businesses. We can see that in these matters the legal question is subordinated to questions of calculation and administration.” (Portalis 1999, 51)

From this point of view the adjudication of some matters depends clearly on “technical” knowledge and there is the possibility that the authority in charge of taking the decision will rely heavily on information – findings – provided by technical experts. This part of the process of decision-making is part of the fact-finding process with one important difference: the facts, which should be disclosed, are not facts of the past, but forecasts, possible scenarios.

With this in mind, we can approach the issues of distributive justice and the many cases in which law assumes that possible (foreseeable) results can be part of the foundations or justification of decisions.

## 2.1 DISTRIBUTIVE JUSTICE

The traditional distinction says that distributive justice applies in the sharing of common goods or *status*, while commutative justice is related to exchange of goods. In contemporary or more familiar terms, distributive justice deals with the rules of non-zero-sum games, whereas commutative justice deals with zero-sum games. Before the XVIII Century, law and lawyers should be experts in both cases of justice, as both cases were considered to depend on *rules*.

In the course of the XVIII Century both the form of the State and the purpose of law went through important changes. The most interesting in terms of reasoning is the division between politics and law based on what one might see as the object of the dispute or conflict. There are two important cases in the history of the civil law tradition, cases that can be taken as examples of what happened in several countries: France and Prussia. By different means France and Prussia had to change their administrative machineries. In France, change came through the Revolution; in Prussia change came along the absolutism ilustrado. Legal scholars and state reformers clearly tried to separate political matters from legal matters. It is fairly well known that “courts” of the Old Regime would adjudicate matters of commutative justice (contracts) and retributive justice (crimes) as well as distributive justice (like the definition of prices of sugar in the city of Salvador, for the *Relação da Bahia*). The liberal or bourgeois state had to reshape the whole issue.

The first important step was a distinction between rights and interests. It is more than well known that during the XIX Century legal scholars debated the nature of rights (subjective rights) and finally called them “legally protected interests”. This meant that there might be “unprotected interests”, or simply interests. Rights were the object of law; interests were the object of politics. Law did not protect simple interests, so they could be altered, restricted, affected by legal change and government interference.

The itinerary of such separation can be traced back to the late XVIII century, but was made clear throughout the XIX century and even in the early XX century. Portalis, in his presentation of the Code Civil stated that “the ordinary contracts

between individuals” should not be confused with “commerce at large, whose function was to bring nations together and provide for the needs of the universal society of men” (Portalís 1999, 53). He was still insisting on a division that could be attributed to the affairs of the State in the Old Regime, that is, there should be some areas in which the general interest was to rule over private contracts.

The second important step was the separation of common or regular courts (judicial courts) from administrative courts. Apparently the only difference between both systems of “courts” is that administrative courts decide cases in which one of the parties is a governmental department, officer or agency. But when we look at the legal doctrine written on the subject it is clear that this is not the only issue at stake. It was recognized, for instance, that whenever the Administration was a party to a contract, ordinary courts could decide the case. So what was really at stake was the nature of the conflict: administrative courts would have jurisdiction when the case involved the “public interest”. This was the XIX Century doctrine.

The idea of *public interest* covered the problems of “collective goods” or “commons”. It also covered problems of general “welfare” in several senses. What in fact was at stake in the division of politics, law and administrative law was, in my opinion, the division between matters of commutative justice and matters of distributive justice. If the conflict was one that could be translated into the language of individual exchanges, it was a matter of law: torts, contracts, crimes were all matters in which justice meant a correction, a redress or an exchange. If the conflict was such that it could only be decided in terms of proportion or distribution among more than one party, or if it dealt with “indivisible goods”, then it would be considered a matter of administrative courts, administrative law, and official discretion was acceptable in the settlement of the case. Regular judicial courts should not mediate, should not act with discretion: administrative courts and officers could, and should, decide cases by mediation and could pass judgments based on distributive aspects of the case.<sup>3</sup> France, Germany, Italy, Spain and Imperial Brazil, they all had their administrative courts system, where cases against the Administration should be decided.

So, by the end of the XIX Century and the beginning of the XX Century the matter was fairly well established, and legal scholars had abandoned the field of collective goods, collective interests or general welfare to the realm of politics, or to “administrative discretion”. It seemed to be the realm of pure “convenience” rather than the field of rules and principles. Matters of interest were not matters of law. They would deal with “usefulness” or “prospective gains” of individuals, but they were not a matter of duty or obligation of the Administration, that is, they were not a matter of rights of individuals (Souza 1862, 90).<sup>4</sup>

There has been a considerable change in XX Century legal scholarship and it has been pressed to incorporate distributive disputes. In other words, legal scholarship

has been challenged to incorporate a theory of collective goods, a theory of proportional distribution of burdens and benefits and to incorporate a theory of purposive acts, actions and activities that had been basically exiled from legal reasoning. Legal doctrine had developed a fairly sophisticated account of collective goods. It can still be found in any civil code of the continental tradition under the name of “indivisible goods”. The Brazilian civil code is just one of the countless examples: “Divisible goods are those that may be divided without change in their substance, or considerable decrease in their value, or uselessness for their intended use.” (Art. 87) The wording of the civil code of 1916 was slightly different: “Divisible things are those that may be divided into material and different portions, each one forming a perfect whole” (art. 52). If one thing (or good) can be divided but will change its nature, the law may treat it as an indivisible thing; private parties can also treat things as indivisible wholes. Based on this latter idea, commercial lawyers developed the doctrine of the “azienda” (“estabelecimento”, “Konzern”). This is a very useful device, but I would say that it had been practically abandoned as a general concept. This is why so many “rules” concerning these matters are usually not accepted as part of the “real” law.

Economists, however, have kept the idea alive and problems relating to “collective goods” and “collective actions” have played an important role in economic analysis.<sup>5</sup> Lawyers, instead, have concentrated in the idea of “public goods” with a totally different meaning. In fact, the civil code also mentions “public goods” or “public things”: in Brazilian law public good means “state property” (federal, state or local). Public good here means the opposite of private property (Código Civil art. 98). So the name “public good” is used only to give an answer to the question: who owns this piece of real estate? Who owns these shares of the capital of this corporation? Who owns this street? If the answer is the state, then that will be considered a “public good”.

This, however, is much more the result of the symbolic hegemony of commutative justice in legal reasoning than a fact within the legal system itself. It is fairly easy to find instances in which law has kept the reasoning of distribution. What will follow summarizes a few examples of the survival of distributive disputes in law. The socialist movement, the working class claims were probably the place where “distributive” matters and law met once again.

## 2.2 ECONOMIC LAW AND REGULATION -A HISTORICAL EXPERIMENT FROM VARGAS TO SARNEY (1930-1985)

Economic reasoning and law converged in the middle of the 20th century when welfare, development and planning gained a constitutional role from the times of the Mexican Constitution of 1917 and the Weimar Constitution of 1919. The constitutional discussion in Germany in the 1920s had precisely this issue in view. In

the case of Brazil, the 1934 Constitution gave the State a political (and legal) obligation of fostering development in order to structurally change the Brazilian society. Important legal experiences in this field were the so-called development programs. Beginning with the Juscelino Kubitschek Administration, different presidents presented Congress with development plans. Under the 1967 Constitution, development plans were incorporated into the pluriannual investment budget. A few legal scholars wrote on the subject at that time. They agreed that several of the most traditional concepts of legal scholarship would have to undergo some sort of change or specification.

Historically speaking the debate during the first years of the Vargas years involved two different schools of thought. In the one hand, *liberais*, such as Waldemar **Ferreira**, criticized the establishment of agencies (*autarquias funcionais*) that would assume both quasi-legislative and quasi-judicial powers. Ferreira was loyal to the Republican ideals of 1891: he believed that the separation of powers was a principal condition of freedom. In the opposite field were Francisco **Campos** and Oliveira **Vianna**, two leading figures of the regime. They were on the side of transforming labor committees, which existed in several states, into a federal system of administrative courts. *Justiça do trabalho* was first established as a department of the Executive branch (within the *Ministério do Trabalho*). Oliveira Vianna and Campos showed that among the powers of the *Justiça do Trabalho* were the settlement of disputes (individual or collective) by means of compromises. When a court did that, it was not actually adjudicating: it was mediating. That was one of the reasons to withdraw labor courts from the judicial branch at that time.

Campos and Vianna were also in favor of the establishment of *autarquias* (agencies) that would conduct the economic development. Partisans of Vargas were, at that time, drawing heavily on examples from the American experiment with agencies: they would cite not only agencies created by Roosevelt's New Deal. Of course, this was both a sincere belief that state intervention and liberal institutions were compatible, and an argumentative strategy, as the Republican Constitution of 1891 had been clearly a source of Americanization of Brazilian public law. If the Americans were doing that with their constitution in force, there was no not reason to keep the separation of powers and at the same time create new agencies. So there was some precedent on the discussion of law and economics in the Era Vargas.

The debate in the 1970s (the military regime) was a little bit different.<sup>6</sup> Agencies were an established reality. What was apparently new, or at least taken more seriously, was the idea of a global planning of the economy. Since the 1950s, the JK years, the *cepalinos* believed that a general view of the economy was essential. State decision should not be guided by partial action in different sectors. The

American experience was of much lesser help in these circumstances. Contrary to what had happened in Europe, Brazil and several other places, the USA had never established a constitutional welfare state. Welfare rights were not written in the constitution.<sup>7</sup> If the examples used by the Vargas regime were imported from the American tradition, during the military regime examples came from the post-war European states. The French tradition might be useful, and in fact that is what happened. When reading Brazilian legal doctrine concerning administrative law and financial law at that time one will soon discover that it was the French who were cited. The theoretical influence of the French administrative law was very important. The few legal scholars who dedicated themselves to the subject usually refer to French scholars and the fairly well established difference between the *effectiveness* of plans: plans were binding on the Administration (direct and indirect), but were only indicative to private corporations. Two separate fields of public law had to be joined to give some legal rationality to what was being done: *direito financeiro* and administrative law. A new classification of laws was made to accommodate what was then called *Massnahmegesetz*, *leis medidas*, or *leis de efeitos concretos*. But the import of the European model was not simple. There were important institutional differences. In the European tradition there were systems of administrative courts, ordinary judges were career judges, and Constitutional Courts had exclusive jurisdiction on constitutional matters. That is a totally different design from the Brazilian republican tradition, where career judges had powers of review and where no administrative courts existed. It was predictable that institutional conflicts might arise, as in fact, after the 1988 Constitution they appeared with growing importance and growing levels of reciprocal interference between the Executive and the Judicial branches.

It was accepted that plans, by their own nature, would cause differentiations. In this respect it would be acceptable that results of economic legislation would not affect every citizen equally. It was further agreed that economic legislation dealing with development and planning could be changed and revised without granting citizens, in principle, rights of compensation against the Administration (**Couto e Silva**, RF 278, 368). Statutes concerning economic legislation were considered naturally “flexible”, that is, they would bind but within the limits of “economic possibility” (**Grau** 1978, 238, **Grau** sdp, 282). So, the tort doctrine had to be reviewed to accommodate state liability in the case of development policies or economic planning. Government action in these fields should not be strictly compared to breach of contract, breach of promise or traditional tort cases in general.

The doctrine of economic legislation and economic planning in Brazil has its own history of failure. Economic planning was identified with the military regime and with its final and long economic crisis. On the other hand the doctrine created along the economic planning issues at the federal constitutional level was never really

applied in other fields in which law met other disciplines, such as urban planning or environmental protection. The theoretical problems involved in economic planning were not always acknowledged as being of a similar nature of those in other fields in which statutes would refer to specific objectives and results.

Economic planning during the military regime shared the fate of budgetary legislation in general. In fact, development plans had to be translated into the language of budgetary provisions and were then given the name of “pluriannual investment budget”. At that time, Congress had lost its power of amending the budget proposal, so it was fairly easy for the common sense of younger legal scholars and federal judges to assume that economic planning and dictatorship went hand in hand and the only way to defend democracy was to limit, as much as possible, the powers of the Executive power to interfere with economic planning.

Another aspect of the crisis of the 1980s was the growing rate of inflation. In trying to curb inflation, the Executive branch would from time to time take legislative initiatives (either through *decretos-leis* or later through *medidas provisórias*), which would normally be called “economic plans” or “stabilization plans”. Most of these “plans” were short-lived and were not capable of putting an end to inflationary spirals. Courts and legal scholars were then caught in the middle of the crisis without being able to give adequate answers. The most important example was the reaction of the Supremo Tribunal Federal during the 1990 monetary reform program of the Collor Administration: it refused to decide the issue of the constitutionality of the stabilization program and did not take the risk of adjudicating such a serious matter with unpredictable consequences.

### 2.3 PRIVATE LAW AND PROCEDURAL LAW

It is not only the law of planning or economic law that provides interesting examples of the use of “economic” reasoning into law. I would like to give a few legal institutions of this nature in the most traditional fields, in private law and procedural law. One can find several instances of cost-benefit reasoning and forward-looking rules in private law. In several cases, private law will establish results to be attained, and parties and judges can and should consider these results to determine what is legal, illegal, just or unjust.

If liability is traditionally ascertained as a means of corrective (commutative or punitive) justice, does it apply equally to matters of economic regulation? If economic regulation is taken “*caeteris paribus*”, if it is, by definition, dependent on contingent events, how do you adjudicate regulation? Is there a special liability in case of distributive justice? What is it? What sort of liability can be found in cases of plans and results to be achieved? Legal doctrine has a traditional example of dealing with the last issue, that of results to be achieve, but I am not sure that it has been sufficiently expolored in public law. I am referring to the classification of obligations into



obligations of means and obligations of results (obrigações de meios e obrigações de resultado). The distinction was created by Demogue, and widely used (Pereira 2002, 33, Gomes 1988, 451). Some civilists reject it as a general classification, but they acknowledge that it may be useful “to ascertain liabilities” (Pereira 2002, 34), or to determine the “ônus da prova”, the “burden of the proof”. In fact the difference between them lies in the extent to which the obligation has been performed and in case of nonperformance what sort of evidence would provide the debtor with a legal “acquittance”. In case the obligation is one of “means”, the debtor is considered to have complied with it as long as he has used “due diligence” to perform his duty even if he has not been able to produce a certain “result”. If the result is what is actually due, the creditor has a right to compensation if the result was not finally produced. The debtor will not be held liable only if she shows evidence that the performance became impossible without her fault (as in the general cases). We are all familiar with the most traditional example: a surgeon is bound to perform a surgery with “due care” and using the best techniques he knows, etc, but he is not liable for the result of the surgery (the issue is put in a slightly different way in cases of esthetic or plastic surgeries for esthetical and non-functional purposes). Liability is just one case in which the forward-looking, distributive character of legal rules is to be reconsidered. Other examples may be found.

### 2.3.1 CORPORATIONS, CONTRACT LAW AND PROCEDURAL LAW

Corporations and partnerships are areas in which distributive rules play a central and constitutive role. Even if some civil codes define partnerships (*sociedades*) as bilateral contracts, many scholars have always insisted that partnerships should not be treated within the same framework as sales (*emptio venditio*). In partnerships there is what Ascarelli called a plurilateral relation (Ascarelli 1949), so that reciprocity is not commutative, but distributive and proportional among the partners. In partnerships the “contractual” relationship is of an on-going nature, it is made to last until it reaches a final purpose (the object of the partnership, the “*objeto social*”). The duties of the partners have to be evaluated from the point of view of their cooperation for the attainment of the common purpose. The social capital has to be treated as a common stock (community property) and until loss or profits are finally distributed individually at the end of each year or at the end of the partnership itself, each partner is not considered to have a “right” in any specific part of the common assets.

Cost-benefit analysis is imported into legal reasoning in civil procedure. Art. 620 of the Civil Procedure Code provides that the enforcement of decisions (*execução*) should be made at the least costly way as regards the debtor when that is possible. Another instance of cost-benefit analysis is the so-called principle of procedural economy: art. 244 of the CPC provides that procedural acts should not be invalidated when they have been functional to their ends, in spite of their form



(except when there is specific legal prohibition of it). The Criminal Procedural Code (CPP) provides another interesting example: art. 563 provides that no act shall be nullified unless it results in a “*prejuízo*” (loss) to either defense or accusation. These are all examples of the use of cost-benefit analysis in law. In all these examples the legal argument can incorporate a discussion of the results of the act, in spite of a previous definition of formal legality. The reasoning is based on results, not on principles.

### 2.3.2 FAMILY LAW

One of the most typical cases of cost-benefit analysis can be found in family issues, particularly in alimony legal suits. Cases of alimony are the best-known example. In deciding a case of alimony there are several issues at stake. The first one is: is there a duty of A to pay alimonies to B? The question may be slightly complicated as the duty of A can coexist with the duty of C and D: suppose a father or mother who is ill and needs assistance. All of his or her children have a duty to assist them, even though this duty may be shared in different proportions. The second issue has to do with “how much”. Courts have tended to define standards. It has been adopted as an acceptable measure that the debtor should pay one-third of his income to the creditor of alimony. This rule tends to be adopted to ordinary cases, when the debtor has a regular job, usually as an employee of a regular business corporation. Things get a lot fuzzier when courts deal with great fortunes or with people who do not earn regular salaries. In such cases empirical surveys might show that there are lots of compromises and family courts act more like mediators than adjudicators. A close analysis of these cases shows that judges, just like administrators, have a great deal of discretion in these cases. I would say that this discretion results from the very nature of the conflict before the court.

Cases of child custody are also a good example. A judge is allowed to give the custody to the parent (or adult) who is most likely to give the child better living conditions overall taking into account past events. In family law, therefore, cases of child custody may be decided on the best interest of the child. Consideration of potential results may enter the *ratio decidendi*. These cases have not been charged with the accusation of being non-legal matters.

### 2.3.4 CRIMINAL LAW

This is also true in criminal law, to a certain extent. The criminal code provides for a certain “spectrum” within which the judge may apply the penalties to the convicted person. But in the course of his penalty, the law provides for possible reductions and changes. These are considered “disciplinary” or “administrative” matters, but some of them are decided by a judge (*juiz das execuções penais*) who supervises the application of the law.

These examples show how “judicial discretion” may be viewed as the equivalent, in terms of reasoning, of “administrative discretion”.

### 2.3.5 ANTI-TRUST LAW

In antitrust law, certain mergers may be acceptable and licit (legal) under the proviso that some results will obtain and that benefits shall be distributed through the “market”. If the business corporations concerned show sufficient evidence that the overall result of their merging process will bring considerable benefits to consumers, they will be allowed to merge. The legal decision will explicitly incorporate future (probable) results as its basis (foundation, motivation, *ratio decidendi*).<sup>8</sup>

### 2.3.6 RES IUDICATA

In most, if not all the cases mentioned above, there is a legal exception of the *res iudicata* principle. It expressly admitted by art. 394 and 401 of the Código Civil (cases of child custody and alimonies). If changes occur in the life conditions of creditor or debtor, the judge is allowed to change the rulings.

The *Class Action Act* (Lei da Ação Civil Pública, lei no. 7.347/85) created the so-called “civil inquiry”, led by the Ministério Público. This has been the favorite locus for compromises, where the potential defendant may accept a “compromisso de ajustamento de conduta”, where he negotiates the terms in which he will, in course of time, change his activity or behavior. Similar things can be found in the Anti-trust Act, in the case of the “compromisso de desempenho” (performance agreement) in art. 58. Even after a decision has been rendered, the administrative court will follow the activities of the interested parties to verify if results are or are not being achieved.

When reviewing the literature on economic planning the same characteristic may be found. When legal scholars say that plans can be reviewed and their foreseen results do not create any subjective right to individual citizens, they are probably dealing with something analogous to the alimony cases. Economic regulation is permanently subjection to changes in view of the results to be obtained. Now this, of course, should work in many directions, including the well-known “adequacy of the economic and financial balance of public contracts”. In case of excessive gains – or excessive losses – the private operator of a public utility could be subject to re-discuss the terms of the agreement.

This basic idea has some complications when we deal with macro-economic themes. First, the fact-finding will show a particularly complex nature. Facts of the macro-economic level are not brute facts: many of these are institutional facts. The very word “market” is of this nature: there is the ideal market, an ideal-type used by economics to refer (I would not say describe) to the “reality” that needs to be built and needs to be “saved” or “maintained” by a system of collective action and collective intentionality. There is, on the other hand, an actual market. This actual market

is referred to in the anti-trust legislation as “the relevant” market. There is also a lay, ordinary language use of the word “market”. How far does it identify with the use of the term in economic researches? How far is it co-extensive with the word used in a specific research? How far should this research go to define the market? Is “market” co-extensive with “society”? When the law says that the Agency should take into account the public interest, the national interest or the general interest, how does the actual “market” or even the “ideal” market fit into it? Now in adjudicating or deciding matters of regulation an authority has to refer to “the market” in at least both these senses.

### CONCLUDING REMARKS

A quick look at the statutes that created the new regulatory agencies in Brazil in the late 1990s gives a meaningful insight into the theoretical problems that lawyers may face when interpreting and applying them. Two examples may suffice: Lei no. 9.472/97 (telecommunication industry – Agência Nacional de Telecomunicações) and Lei no. 9.478/97 (oil industry – Agência Nacional do Petróleo).

The law concerning the oil industries begins with a broad provision on the purposes of the national energy resources policies. Art. 1 states the purposes (objetivos) of the policies (in its caput). Some of them are rather general and open an immense field for discussions and interpretation: to secure the national interest, to promote development, enlarge the labor market, to protect the environment, etc. From any point of view they give rise to a variety of questions. Many of them – if not all of them – are potentially contradictory and they cannot be pursued all at the same time, except by distributing benefits and burdens in different proportions. It is basically impossible to foster capitalistic use of energy and save the environment, as it is very difficult reconcile capital investment and protection of the labor market. One possible solution for the simultaneous implementation of all these principles is to consider them under one very general policy to create an energy market in the country and then try to distribute the benefits of this market. So what is clearly the case is that these purposes can only be integrated in a distributive system, in which a zero-sum (exchange) rationality is not adequate.

Provisions of this sort were much less of a problem in a time when Congress passed, following the initiative of the Executive branch, the National Development Plans. In that case, Congress would set general economic policies, by means of the National Development Act, and specific numbers would be defined as results to be achieved. After the failed military regime and the change in the international financial and economic scene, confidence in National Development Planning dropped sharply and a political discussion, that could take place in a political sphere, is diverged to the regulatory agencies. Nowadays, the new agencies not always have an

integrated agenda of development, and the numbers that once were in the *planos nacionais* may be found in the concession agreements or in autonomous decisions of the agencies boards. Problems of interpretation of the agencies' rulings are then multiplied, as they will face problems of political (and constitutional) legitimacy. Should they be given complete freedom of action and should they be given complete freedom of action based on "technical expertise" alone? Problems of this nature have surfaced in the last months.

Another important aspect of the law is that it incorporates into the legal world economic, political and social objectives. The Administration is charged with the task of creating things that do not necessarily exist and things that are not simply "things"; they are social conditions and can best be visualized as aggregate values. They are "states of affairs". The wording of the law is essentially written in the language of macro economic (labor market, consumers interest, free competition), social and political theory (development and national interest). These are not ordinary concepts, such as 'land', 'children', 'motor vehicle', or others that can be found in other legislation. They are not things that are there. They may also hide enormous difficulties in the distributive agenda of the federal government, especially in a society as divided (in terms of social classes and regional differences as Brazil). Regulation that apparently increases the numbers of cellular telephone users may affect diversely the level of indebtedness of consumers, and an accurate study of this sort is not always conducted by the new regulatory agencies.

Many of these provisions open the doors for rationality, which is not just legal rationality, in the modern individualistic sense of pure commutative relations. They allow for the use of "technical" reasoning, which puts two difficulties to a "regular" legal reasoning. This sort of reasoning, as the examples used above help to understand, not controlled by legal means alone: the legality or illegality of a given act or business depends on criteria defined within the realm of another discipline. Second, the legality or illegality of the behavior or policy is made dependent on results: if it proves an efficient policy to a given result it may be legal, if it proves inefficient it may be illegal. In other words, a "prudential" reasoning (prudential in the Kantian sense) makes its way into the law. But that makes the judgment dependent on results, which, by definition, are contingent (when not random).

What is law today? Does it still command, prohibit and allow? Is it a change in law, a change in sources, and a change in the purpose of the political authority? For many, legal reasoning has been constrained to deal with qualifying behaviors as licit and illicit. In this respect, legality has been cut from any other consideration regarding the consequences of behaviors. From this point of view all decisions allowed to deal with the intended consequences of human action are assigned to different fields: politics, economics, ethics. This is not totally true: there are fields in which considerations of the utility and result of human actions are still allowed to count for legal purposes.

But law, also incorporates certain ideas that may be called absolute. Of course, one would be tempted to say that this is so only in contemporary Western philosophy, most notably in the tradition of natural lawyers. In fact, whereas it was hard to find any assertion that rights were absolute in earlier philosophers and lawyers, from the XVII century on lawyers begin to talk about absolute rights. Absolute rights have been translated into contemporary theories under the name of “non reciprocal” rights or relations. The holder of a natural, fundamental, absolute or ‘non reciprocal’ right enjoys the protection of the law no matter what he or she does to his fellow human beings. This idea of right is, of course, hard to combine with the relativism of economic thinking.

All this is law, and all this is legal reasoning. This is not considered typical in a perfunctory view, and some people would even ignore this as an important aspect of law. But that is only *per caso*. In fact, cases like these are not infrequent and legal professionals (scholars and practitioners) deal with them on a day-to-day basis. I would like to bring to light this fact to conclude that some of the changes through which nation-states, liberal states and modern contemporary states are going through may be, partly and only from the legal point of view, a rearrangement of functions that will make decisions, that is legal decisions, more like cases of family or antitrust. In other words, certain forms of legal reasoning that have been considered peripheral or secondary in legal thinking will probably become more important.

## NOTES

1 The best comment on Kelsen's theory in the last years has been Nino's explanation of the role of the *Grundnorm* in validity. (Nino 2003)

2 The famous study of Banfield (*The moral basis of a backward society*) might be a typical example. Traditional communities do not create separate spheres and then seem “dysfunctional” to a modern eye.

3 Literature on the subject is growing. For the German case see in general Stolleis (1992), for the Italian case Grossi (2000).

4 Lon Fuller in his famous essay on the limits of adjudication does not mention this essential idea. This puts him into great difficulty as he tends to equate adjudication with commutative conflicts and commutative justice with rationality. Arguments of distributive justice, as in the tradition I am discussing here, are left to the field of political will, not arguable in rational terms.

5 Joseph Roemer asserts that “many economists who work in the areas of social choice theory and welfare

economics are quite unfamiliar with contemporary philosophical thinking on distributive justice” (Roemer 1996, 1) This is also true, I believe, of lawyers. As Roemer puts it, there has been a renaissance of philosophical interest in the matter since the publication of Rawls’s *A Theory of Justice*. Thomas Wilhelmsson also shows how consumer protection has to be understood primarily from the point of view of distributive justice (or social justice, as it has been called by many in the XX Century due to the influence of Christian social thought).

- 6 A general overview of the historical development of plans in Brazil can be found in Bercovici, 2003.
- 7 The so-called “second bill of rights” is compatible with constitutional law, but is no written text (cf. Sunstein, After the rights revolution).
- 8 The Anti-trust authority in Brazil (CADE – Conselho Administrativo de Defesa Econômica) is probably the only existing example of an administrative court in Brazil. This is probably why the debates around its standing as an independent department is so strong.

## BIBLIOGRAPHY

- AQUINO, Tomás de. (1999) *Summa Theologiae*. 3a. ed. Roma: San Paolo.
- ASCARELLI, Tullio. (1949) Il Contratto plurilaterale, in *Saggi Giuridici*. Milano: Giuffrè.
- BERCOVICI, Gilberto. (2003) O Planejamento e a Constituição de 1988. *Constitucionalizando Direitos – 15 anos da Constituição brasileira de 1988*. Fernando Scaffi (ed) Rio de Janeiro: Renovar.
- CAMPOS, Francisco. (1940) *O Estado Nacional*. Rio de Janeiro: José Olympio.
- CANARIS, Claus-Wilhelm. (1996) *Pensamento sistemático e conceito de sistema na ciência do direito*. 2a. ed. Lisboa: Calouste Goulbenkian.
- CASTRO, Marcus Faro (1997). O Supremo Tribunal Federal e a judicialização da política. *Revista Brasileira de Ciências Sociais*, 12, 34 (p. 147-156).
- CAVALCANTI, Themístocles Brandão. (1936) *Instituições de Direito Administrativo Brasileiro*. SLP: Freitas Bastos.
- DUGUIT, Leon. (1912) *Les Transformations générales du droit privé depuis le Code Napoléon*. Paris: Félix Alcan.
- FULLER, Lon. (1981) The Forms and limits of adjudication, in *The Principles of Social Order*. Kenneth Winston, ed. Durham (NC): Duke Univ. Press.
- GOMES, Orlando. (1988) Responsabilidade civil de cirurgião plástico. In *Questões de Direito Civil*, 5a.ed. Rio de Janeiro: Forense.
- GRAU, Eros Roberto. (1978) *Planejamento econômico e regra jurídica*. São Paulo: Revista dos Tribunais.
- \_\_\_\_\_. (sdp) Notas a respeito do direito do planejamento: uma hipótese a discutir. *Revista de Direito Público* 41-42, 281-283.
- GROSSI, Paolo. (2000) *La Scienza Giuridica Italiana*. Milano: Giuffrè.
- HABERMAS, Jürgen. (1993) *Justification and application*. Cambridge (MA): MIT Press.
- HART, Herbert. (1986) *O Conceito de direito*. Lisboa: Calouste Goulbenkian.
- KANT, Immanuel (1995) *Crítica da faculdade do juízo*. (trad. V. Rohden) Rio de Janeiro: Forense.
- KANT, Immanuel (1995 a) *Duas Introduções à crítica do juízo*. (trad. E edição de Ricardo M. Terra). São Paulo: Iluminuras.
- MACCORMICK, Neil (1995) *Legal reasoning and legal theory*. Oxford: Clarendon Press.
- MERCADO PACHECO, Pedro. (1994) *El Analisis Economico del Derecho*. Madrir: Centro de Estudios Constitucionales.
- NINO, Carlos Santiago. (2003) *La Validez Del derecho*. Buenos Aires: Astrea.
- PEREIRA, Caio Mario da Silva. (2002) *Instituições de direito civil*. v. 2, 19a. ed. Rio de Janeiro: Forense.
- PORTALIS, Jean-Etienne-Marie. (1999) *Discours préliminaire au premier projet de Code civil*. (1a. ed 1844) Paris: Confluences.
- PUFENDORF, Samuel (1934) *De Jure Naturae et Gentium*. (fac-similar de 1688, Amsterão) Oxford: Clarendon Press.
- RAWLS, John. (1992) *A Theory of Justice*. Oxford: Oxford Univ. Press.
- ROEMER, John E. (1996) *Theories of distributive justice*. Cambridge (MA): Harvard Univ. Press.
- SILVA, Almiro Couto e. A Responsabilidade do Estado no quadro dos problemas jurídicos do planejamento. *Revista Forense*, 278, 367-371

- SILVA, Clovis Couto e. (1991) O Planejamento da economia brasileira. *Revista de Informação Legislativa*. Brasília, ano 28, no. 109, 43-60.
- SOUZA, Paulino José Soares de (Visconde do Uruguai) (1862) *Ensaio sobre o Direito Administrativo*. Rio de Janeiro: Typographia Nacional.
- STOLLEIS, Michael (1992) *Geschichte des öffentlichen Rechts in Deutschland*. München: C. H. Beck.
- VIANNA, J. Oliveira. (1938) *Problemas de Direito Corporativo*. Rio de Janeiro: José Olympio.
- WEBER, Max. (1977) *Economia y sociedad*. México/ Bogotá: Fondo de Cultura Económica.
- WILHELMSSON, Thomas (1996) "Consumer law and social justice" in *Twelve essays on consumer law and policy*. Helsinki: University of Helsinki.
- WITTGENSTEIN, Ludwig. (1991) *Investigações Filosóficas*. (col. Os pensadores) São Paulo: Nova Cultural.

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